



# TelLAWCom Labs Inc.

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May 20, 2011

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St. SW, Rm. TW-A325  
Washington, D.C. 20554

**Re: Application of AT&T and Deutsch Telekom AG (Applicants) for  
Consent to Assign or Transfer Control of Licenses and Authorizations  
(WT Docket No. 11-65)**

Dear Ms. Dortch:

Attached is the REPLY of TelLAWCom Labs to Applicants' Objection to its Acknowledgment of Confidentiality. While it is true that TelLAWCom Labs Inc. "advises companies on how to manage their relationships with AT&T" it has no business or financial interest *whatsoever* in any major wireless carrier in competition with the Applicants. TelLAWCom Labs Inc. has no plans presently or in the future to enter the wireless business itself. As a technical consulting firm, TelLAWCom Labs does not advise clients on *competitive strategies* in wireless. There is simply no issue of "*Competitive Decision Making*" under the Protective Order.<sup>1</sup>

In its business, TelLAWCom Labs only advises its clients in their efforts to obtain various rights, commitments and obligations from AT&T to which they are entitled under Interconnection Agreements, tariffs and contracts. AT&T would have this Commission believe however that TelLAWCom Labs is a group of individuals bent on making unfounded accusations that are ultimately unsuccessful. This is far from true.

If the Commission approves the Applicants' Motion it stands to deprive itself and the General Public of the unique and valuable insights, opinions, and facts of [Leo A. Wrobel](#). This expert has a decade-long history of working in precisely the kinds of anticompetitive situations that can worsen if this merger is approved without full knowledge of all facts and their resultant consequences. Full access to *all* records in this proceeding is essential to render these opinions for the Commission and the Public.

Since AT&T attached a few irreverent letters to its Objection, we have attached a few of our own letters, as they speak for themselves and bolster TelLAWCom Labs position. Please consider them thoughtfully, as well as the fact that TelLAWCom Labs Inc. has no interest presently or in the future in going into a wireless business in competition with AT&T. For the sake of an enlightened Public and regulatory apparatus, we respectfully request this Commission DENY the Applicants' Motion.

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<sup>1</sup> General "Litigation Activity" against AT&T is not a valid basis for granting Applicants' Motion. If it was, this Commission would have to exclude most commenters.

## Why This Commission Must Deny the Applicants' Motion

AT&T points to Premiere Network Services Inc., and the fact that this company filed 17 formal and informal complaints between 1998 and 2005.<sup>2</sup> True enough, but Premiere was run into bankruptcy single handedly by AT&T. This Commission deserves “the rest of the story” not only because of what happened to Premiere, but because it still happens today.

For over a decade AT&T has been a wholesale supplier of “network elements” to competitors, like Premiere, who use these network elements to construct finished services for their customers. The governing agreement between AT&T and its competitors is called an Interconnection Agreement, or “ICA.” As part of the ICA, (or Commercial Agreement) AT&T is responsible for promptly processing service orders, for rendering accurate bills, and providing accurate call detail records (CDR). In order to assure AT&T does not “back slide” in performance to its competitors, AT&T agreed to pay liquidated damages (also called PMs) if AT&T’s performance falls below certain pre-agreed measurements.

AT&T is also required to provide a level of support to its competitors in “parity” with AT&T’s own customers. The whole idea of “parity” however became at best an afterthought once AT&T got what it wanted in Texas and from this Commission in June 2000.<sup>3</sup> Consider the existence of [TelLAWCom Labs Inc.](#) If AT&T’s previous merger and 271 commitments were in fact working, there would almost be no reason for a company like us to exist.<sup>4</sup> The following highlights a few real-life experiences of our Clients and of the undersigned. These may be taken as indicators of future AT&T performance if this merger request is approved.

- The former principals of Delta Phones Inc. (DPI) retained TelLAWCom Labs, Inc. to produce an Executive Report of issues and offsets in the provision of service from AT&T (then SBC) to DPI. TelLAWCom Labs produced a report and backed up its conclusions with AT&T data, obtained in part through Public Information Act (PIA) requests. As part of one PIA request with the Public Utility Commission of Texas (PUCT), we received AT&T service orders that were previously filed under confidential cover in Docket 28041 (*Complaint of Delta Phones vs. AT&T*). Without question, the orders showed evidence of tampering by AT&T. The kind of service order tampering noted could have easily been used deliberately to limit or avoid damages payments to DPI or other CLECs. We have noted the same abnormalities with other CLEC clients.<sup>5</sup>

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<sup>2</sup> Page 2 of Applicants' Motion, second paragraph.

<sup>3</sup> The FCC noted in its approval of SBC’s 271 application: “*Working in concert with the Texas Commission, we intend to monitor closely SWBT’s post-approval compliance..... We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to SWBT’s entry into the Texas long distance market*”. – Memorandum Opinion and Order in FCC Docket No. 00-238, Application by SBC Communications to Provide In-Region InterLATA Services in Texas, June 30, 2000, at 436.

<sup>4</sup> In fact, the undersigned has admitted in marketing materials that TelLAWCom Labs, Inc. was founded as a “*poke in the eye to AT&T*” after one of our companies was run out of business by AT&T practices described herein. Interestingly enough though, in the five years the Texas “T2A” ICA was in effect, of a \$1.445 billion cap, AT&T paid just over \$30 million in liquidated damages in Texas, or less than 5% of the cap. Of this amount, some \$10 million was paid only after a complaint of one type or another by the principals of TelLAWCom Labs, Inc.

<sup>5</sup> FCC Docket No. 00-238, Memorandum Opinion and Order, Application of SBC Communications to Provide InterLATA Services in Texas, at 428 states: “*The Department of Justice states, and we agree, that the reliability of reported data is critical, and that properly validated metrics must be meaningful, accurate and reproducible.*” The FCC further affirmed in the same Order: *In particular, the raw data underlying a performance measurement must be stored in a secure, stable, and auditable file if we are to accord a remedy plan significant weight.*”

- Consider the case of AccuTel. In documents obtained from the PUCT we learned that AT&T paid liquidated damages (for poor performance) to AccuTel in the amounts of \$196,235.57 and \$605,792.50 in the years 2001 and 2002 respectively. This equates to about \$50,000 a month during 2002.<sup>6</sup> By January 2003, the PM payments to AccuTel dropped to only \$14,000 a month with no explanation. It has since been learned that this sudden reduction coincided with an edict by SWBT management to “eliminate liquidated damages payments by any means possible.” Please follow the link below or refer to his sworn affidavit in [Texas PUC Docket 30463 Item #8, Affidavit of Demetrius T. Davis Sr.](#)
- TelLAWCom Labs, Inc. client Connect Paging Inc, d/b/a Get-A-Phone. (GAP) filed a complaint with the PUCT in Docket 32897 when AT&T threatened to shut them down over an alleged amount owed to AT&T of \$350,000. GAP countered that some \$550,000 in various amounts was owed by AT&T. In Order No. 2 of that proceeding, the PUCT abated Docket 32897 for two months in order to allow TelLAWCom Labs, Inc. time to complete an audit. After TelLAWCom Labs, Inc. completed its report, GAP and AT&T settled, not for \$550,000 but for \$700,000.<sup>7</sup>

### **Premiere Network Services Inc.**

Premiere Network Services Inc., (Premiere) is a company the undersigned and his associates owned before it was run into bankruptcy by AT&T.<sup>8</sup> In the *Premiere* case, AT&T bought its way out of a large claim and avoided having its OSS system placed on trial as the root cause of the claims. The “17 cases” AT&T alludes to included allegations by AT&T's own employees that AT&T misrepresented data, destroyed data and altered evidence.<sup>9</sup> Much of the story can be found in PUCT Dockets [30463](#) and [30697](#) and in Case No. 04-33402-HDH in United States Bankruptcy Court for the Northern District of Texas, Dallas, Division. Over our vehement and well-documented objections, AT&T made an offer to the Trustee in *Premiere* totaling about \$1.5 million (\$640,000 in case plus release of all claims) to get rid of Premiere and end the 5 year history of constant AT&T performance payments which follow on the next page.

In the AT&T settlement, the Trustee dropped several adversary proceedings pending against AT&T in court as well as all claims pending at the PUCT. While AT&T's actions no longer offer the principals of Premiere any avenue to financial recompense for a decade of battles against AT&T, their experience might still serve a purpose by showing what AT&T is capable of doing to its competitors.

Note that the figures do not include an estimated \$3.5 million in liquidated damages due at the time to Premiere, but instead only count actual refunds for known AT&T non performance.

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<sup>6</sup> See PUCT Docket 27414 and 29828, AccuTel vs. SWBT, Affidavit of Penelope Polly Barfield, CFO.

<sup>7</sup> See PUCT Docket 32897, *Petition of Connect Paging Inc. d/b/a Get a Phone* (GAP) dated 6/30/06.

<sup>8</sup> Premiere was not an insignificant small business as AT&T would have this Commission believe. Its customers included American Airlines, Southern Methodist University, VarTec Telecom, USAA and others. Its Board members included such people as the Chief of Staff to the Chairman, Texas Public Utility Commission, a former Air Force General, the Director of the United States Mint, and a former AT&T executive. If a company like this could not survive, what chance did anyone else have? Ten years later and we all know the answer.

<sup>9</sup> See testimony of Renee Dodd and Demetrius Davis, former SBC / AT&T employees in PUCT Docket 30463, [Items #8](#) and [#9](#) respectively. Ms. Dodd also testified in the Premiere bankruptcy Case No. 04-33402-HDH in United States Bankruptcy Court for the Northern District of Texas, Dallas, Division. Finally, Ms. Dodd also complained to all five FCC Commissioners regarding this matter while employed with AT&T.

## **Is It Any Wonder WHY Premiere Filed 17 Complaints Against AT&T?**

May 2000	\$553,000. <sup>10</sup>	paid by SBC due to OSS problems (USAA and SMU)
April 2001	\$240,000. <sup>11</sup>	paid by SBC due OSS issues (SMU and VarTec)
October 2001	\$167,000. <sup>12</sup>	paid by SBC due to loss of ALL Call Detail records.
December 2001	\$ 77,000.	PM Payment by SBC - email obtained in discovery
October 2002	\$ 80,000. <sup>13</sup>	paid by SBC loss of ALL records for one customer.
November 2002	\$108,975. <sup>14</sup>	paid by SBC for loss of ALL records.
Spring 2003	\$360,000 <sup>15</sup>	refunded by SBC due to botched disconnections
March 2003	\$6,408. <sup>16</sup>	paid by SBC by order of the Texas Commission.
November 2004	\$32,451 <sup>17</sup>	paid by SBC for exclusion of data
January 2005	<u>\$34,242</u> <sup>18</sup>	paid by SBC after Premiere PUC Complaint

**Total                      \$1,659.076**

Still in dispute at time Premiere forced into bankruptcy:                      \$1,362,000.<sup>19</sup>

Unpaid but confirmed for single large customer:                      \$195,000.

Grand Total                      \$3,216,076.

### **Estimated SBC billing over 60 months = \$60K per month**

Average Confirmed Overbilling                      = \$27,651. (46% average SBC overbilling rate)

Average Including Disputes                      = \$53,601 (89% average SBC overbilling rate)

Conclusion: *SBC error rate on billing to Premiere was between 46% and 89%.<sup>20</sup>*

Note: Premiere averaged \$3 million in annual revenues. The disputes above do not include millions in PM Damages. Most AT&T competitors can tell a similar story.

<sup>10</sup> Of this claim, it was later found that SBC underpaid Premiere no less than \$500,000 in reimbursements.

<sup>11</sup> Of this claim, it was later found that SBC underpaid Premiere no less than \$455,000 in reimbursements.

<sup>12</sup> SBC underpaid Premiere because the baseline period used was a period where SBC had not corrected all of problems.

<sup>13</sup> Premiere originally lodged a \$230,000 claim and "negotiated" with SBC to a level of \$80,000.

<sup>14</sup> SBC agreed to pay only this amount – out of a Premiere invoice to them for \$364,000.

<sup>15</sup> SBC first initiated collection proceedings and denied all problems. SBC still owed another \$195,000 due to same problem.

<sup>16</sup> SBC first agreed with Premiere that \$47,000 was due, but changed after consultation with their finance department.

<sup>17</sup> This adjustment to Premiere's bill was made nine months after SBC was ordered to do so. SBC would not have made this adjustment if Premiere had not reported SBC to the PUCT for non-compliance with Order 48 as outlined in this response.

<sup>18</sup> This additional adjustment was made only after Premiere Employees filed a formal complaint with the PUCT.

<sup>19</sup> Total includes \$500,000 held back by SBC in 5/2000 adjustment, \$455,000 for 4/2001 adjustment, \$195,000 for new PointOne claims (SBC has already paid \$360,000 but refuses to hear additional \$195K found after Chapter 11 filing.

<sup>20</sup> This figure is consistent with SBC performance. In 2002, the last year in which these adjustments were voluntarily made by SBC, of the \$603,000 billed by SBC, ultimately only \$145,000 was paid in cash by Premiere. This represents an overbilling rate of 75% by SBC to Premiere.

These examples represent only the tip of the iceberg. Even at this Commission, complaints about AT&T's practice of running roughshod over competitors goes back a long time.<sup>21</sup>

### **It's Not Just Us: Other Outside Experts Confirm AT&T Impropriety**

CyberControls is an independent specialist in data forensics. CyberControls was retained by Premiere to investigate the PM reporting practices of AT&T through a forensic examination of AT&T service order data.<sup>22</sup> The results of the [CyberControls report](#) contributed to millions in claims being filed against AT&T in the *Premiere Network Services Inc.* bankruptcy.<sup>23</sup> CyberControls concluded that 46% of Premiere's service orders had been changed to SBC's internal "SS" code to avoid payment of PM damages.<sup>24</sup>

In its conclusions at the top of Page 3 of its final report, CyberControls observed:

*"SBC's explanation for numerous irregularities is highly questionable" and that the "only party that benefits from this continual practice (inserting the "SS" code) was SBC."*

This practice was further confirmed by former AT&T employees who swore under oath, that they personally engaged in this process, and who also named their AT&T superiors who instructed them to do so.<sup>25</sup> Please follow the link below or refer to [Texas PUCT Docket 30463, item #7, Affidavit of Renee Dodd](#).

### **AT&T Modified Its Data In Other Ways As Well**

Many times AT&T computed amounts with redacted data through service order codes that removed "missed" service orders from calculations. TelLAWCom Labs, Inc. caught AT&T again and again, omitting or deleting data used to compute damages payment penalties, simply to cover its own non performance.<sup>26</sup> A few examples include:

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<sup>21</sup> In its Memorandum Opinion and Order adopted 6/30/2000 in the matter of Docket No. 00-238, Application of SBC to Provide In-Region InterLATA Services in Texas, the FCC noted the following on Page 212 at 431: "*Several commenters offer specific allegations that SWBT has engaged in anti-competitive behavior. We have previously stated that we will not withhold section 271 authorization on the basis of isolated instances of allegedly unfair dealing or discrimination under the Act. For example, several commenters suggest that misconduct of SWBT such as intransigence, delaying tactics, perpetual litigation (and sanctionable tactics during litigation, such as destruction of or withholding documents) and the refusal to pay reciprocal compensation, undermines confidence in SWBT's post-grant conduct.* (See Sprint Texas I Comments at 6-8, BlueStar Texas I Comments at 6; Allegiance Texas I Comments at 14-16, Connect Texas I Comments at 6-8. e.spire Texas I Comments at 6, CompTel Texas I comments at 9, AT&T Texas I Comments at 89-95; WorldCom Texas I Comments at 62-63; Covad Texas I Comments at 49-50, 58, 60-62; NALA / PCA Texas I Comments at 3.)

<sup>22</sup> CyberControls finding was that 46% of the orders for one CLEC were changed by AT&T, without authorization, to an internal order code that excluded them from PM damage calculations. See Texas PUC Docket 30463 *Complaint of Premiere Network Services Against AT&T* dated 11/29/04, Exhibit 4.

<sup>23</sup> Case No. 04-33402-HDH in United States Bankruptcy Court for the Northern District of Texas, Dallas, Division.

<sup>24</sup> The detailed CyberControls report can be found on the PUCT web site in Docket 20400, [Item No. 691](#). While the report received a Docket Number, it was never investigated by the Texas Commission.

<sup>25</sup> Also see the testimony of former SWBT employee Renee Dodd in the Premiere bankruptcy, Case No. 04-33402-HDH in United States Bankruptcy Court for the Northern District of Texas, Dallas, Division, where she states under oath that she changed data, typed orders to completion, and withheld discovery in Docket 28209 at the behest of her management, identified by name.

<sup>26</sup> The K-Table was designed to take into account random variations associated with the sample size of orders used to measure AT&T performance. It was discovered however by the Texas Commission that AT&T was taking the K-Table exception upwards of 30 months in a row. (This implies 30 consecutive "false positives" which is an impossibility) The Commission ordered AT&T to refund its competitors in Order 45 of Docket 20400, which AT&T fought for four years through the courts, while many of its competitors went bankrupt. When AT&T finally paid, the payments were understated until challenged by us.

- Local Phone Services Corporation. AT&T claimed they owed \$4800 in liquidated damages, an amount that later, after a challenge by our firm, turned out to be \$80,000.
- Cypress Communications. In this case AT&T claimed to owe \$7800 of what turned out to be \$101,000.
- In another case, Rosebud Communications, TelLAWCom Labs, Inc. asked AT&T why one of its clients had never received *any* liquidated damages at all. In the following two months \$50,000 appeared out of no where on that client's bill. When questioned by TelLAWCom Labs, Inc., AT&T offered no explanation.<sup>27</sup>
- In February 2004, Order No. 48 of PUCT Docket 20400 Ordered AT&T to refund *all Texas CLECs* for certain AT&T non performance. AT&T did not pay until November of that year, nine months after the Order was issued – and only after TelLAWCom Labs, Inc. turned them in. A few months after that, TelLAWCom Labs, Inc. initiated a formal complaint challenging the computations by AT&T and, “oops,” AT&T found that they had underpaid competitors by another million dollars due to an “arithmatic error.”<sup>28</sup>
- AT&T excluded \$1.1 million in PM damages to *Best Phones* by use of the K-Table, despite constant complaints about its performance. When Best Phones complained, it was denied on a legal technicality, even though AT&T refunded all other CLECs in the other four AT&T Southwest States after it lost its appeal in the 5<sup>th</sup> Circuit.<sup>29</sup>

These are not the only incidents where AT&T over-billed, underpaid, deflected claims or otherwise sidestepped its many commitments to this Commission. The undersigned believes that these incidents show cause to believe that AT&T's previous merger commitments were not honored. Therefore, there is no reason to believe AT&T now when they say they will be a “good monopoly” after they are paired up with T-Mobile.

### **AT&T is Driving Other Wireless Providers Out of Business**

Presently, TelLAWCom Labs has provided technical consulting assistance (not competitive or marketing strategies) to two wireless CMRS clients. One provider, *Awesome Paging*, is being threatened with eminent disconnection by AT&T. (See Exhibit 1) The other provider, ASAP Paging, has already been forced out of business by AT&T and now must sue for recompense. In both cases, AT&T over-billed these companies out of existence, sometimes 50 times the correct charges. In both cases the problem is again rooted in the AT&T OSS system. The AT&T OSS spits out bills at Access Tariff rates rather than the correct rate for CMRS providers under the Interconnect Agreement.

TelLAWCom Labs, Inc. has been involved with ASAP and Awesome Paging since 2005 in trying to get this issue corrected. Since that time AT&T has steadfastly refused to fix this billing issue. Instead, every couple of years, AT&T comes up with new *legal* theories in an attempt to shore up its illegitimate and unsubstantiated claim rather than write it off. (See Exhibit 2)

<sup>27</sup> *Rosebud Telecommunications* was never paid liquidated damages at all, but payments coincidentally commenced and continued when AT&T became aware TelLAWCom Labs, Inc. had begun a PUCT inquiry.

<sup>28</sup> The record of these payments are still highly questionable. AT&T paid \$2.7 million to its competitors in November 2004. After Premiere filed a complaint that became Docket 30697, AT&T found an “arithmetic error” which necessitated a second \$1 million payment to CLECs in January 2005.

<sup>29</sup> See KCC Docket 01-SWBT-872-COM, *Best Phones Against Southwestern Bell Telephone LP d/b/a AT&T Kansas*

The basis AT&T is using for the disconnection threat this time is that a telecommunications provider cannot use interconnection for information services. Despite a formal protest and a detailed billing dispute to AT&T (complete with detailed, multi colored spreadsheets) AT&T has never responded except through legal counsel, with a nebulous, blanket denial. Yet, AT&T proposes to *unilaterally disconnect service* to Awesome Paging on the 30<sup>st</sup> of this month, and with it the Paging and Internet service of potentially thousands of end users. The fact that AT&T would try a stunt like this with a wireless competitor at the very time it is seeking forbearance in the wireless arena speaks volumes about what they would do if the T-Mobile merger were approved.

### **There's More: AT&T Tainted Official Audits**

Evidence uncovered in Open Records Act requests shows that an AT&T attorney (and former PUCT employee) influenced the outcome of at least one official Public Utility Commission of Texas (PUCT) audit in favor of AT&T.

As stated earlier, TelLAWCom Labs, Inc. is often employed to verify the accuracy of state and federally mandated Performance Measure (PM) data payments by AT&T to its competitors. In the course of its business TelLAWCom Labs, Inc. filed several “open records” requests (known in Texas as Public Information Act or PIA requests) with the *Public* Utility Commission of Texas. The documents obtained indicate that a former PUCT employee-turned-AT&T-lawyer, may have used her previous relationship with the PUCT to enrich their present employer.

Since 2002, the PUCT has conducted two major audits of AT&T’s PM payments. At least one was unquestionably tainted by AT&T. According to records released under the PIA, AT&T’s employee-attorney went far beyond the traditional attorney client relationship. She actively helped define specifications for at least one PUCT audit, then wrote a Final Order approving that audit. The Order she wrote, [Order No. 49](#) in Docket 20400, absolved AT&T of a potential \$64 million liability, absent any outside comment or outside review whatsoever. More details will be forthcoming in the upcoming *Petition to Deny* by TelLAWCom Labs Inc. but may also be found now by following the link below or by referring to [PUCT Docket 36843](#).<sup>30</sup>

The issues raised in that Docket 36843 include but are not limited to:

- (a) The improper award of a \$200,000 contract absent any bid process.
- (b) No posting or opportunity for public review, whatsoever.
- (c) The drafting of a Final PUCT Order by AT&T, a clearly biased Party and subject of the audit... *approving the audit before the audit was even filed with the PUCT*.
- (d) That Final Order in net effect absolved AT&T of a \$64 million liability.
- (e) The Order was written by AT&T, sent to PUCT legal, forwarded *unchanged* to the Commissioners, and was subsequently signed by them *unchanged*.

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<sup>30</sup> See PUCT Docket 36843: *COMPLAINT REGARDING MANIPULATION OF STATE MANDATED PERFORMANCE MEASURE AUDITS OF AT&T AND REQUEST FOR AN INVESTIGATION OF THE PUBLIC UTILITY COMMISSION OF TEXAS*

## Summary

Regrettably, TelLAWCom Labs often deals with parts of AT&T which, in many ways, represent everything wrong with large U.S. Corporations today; little regulatory oversight, an obsession with profits at all costs, and amoral ethical standards. AT&T *has* undermined competitors for over a decade. Wireless companies *are* still being driven out of business.

Granting the Applicants Motion would deny the General Public a valuable resource. The undersigned provides a unique perspective of ALL of the risks in the proposed merger. Indeed, the kind of risks we specialize in will only be exacerbated if this merger is approved. If this Commission wants the Public to have the full picture, including input from a [recognized expert](#) with *no stake in the wireless business*, it must DENY the Applicants motion.

Yours truly,



Leo A. Wrobel, President and CEO

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**Qualifications of Commenter:** TelLAWCom Labs President [Leo A. Wrobel](#) has over thirty years experience in the telecommunication industry and holds degrees in Telecommunications Systems Technology, Electronics Systems Technology, and Business and Public Policy. His employment history includes AT&T Long Lines and Dallas-based Lomas & Nettleton Information Services, then the largest mortgage banker in the world. Mr. Wrobel was responsible for the first microwave bypass shot in Dallas to a financial organization, and was also the first in Dallas to run T1 telephone traffic over the public cable television system. He was a pioneer in carrier co-location, and was the first company in the United States to locate a computer disaster recovery company in a central office in 1986. Leo also facilitated the largest SONET/ATM network ever installed in Texas, and actually secured “unbundled” pricing for a \$75 billion client the year *before* the 1996 Federal Telecom Act. Leo is the author of twelve [books](#), beginning in 1990 with *Disaster Recovery Planning for Telecommunications* (Artech House Books) and including other titles such as *Understanding Emerging Network Services*, *Pricing and Regulation*. His most recent works include “*Business Resumption Planning Second Edition*” and “*Disaster Recovery Planning for Communications and Critical Infrastructure*” and over [800 trade articles](#). Wrobel has conducted telecommunications seminars on Emerging Broadband for over twenty years and has spoken at such noteworthy forums as the ICA SuperCom conference, ACUTA, CCMi McGraw Hill, IAEM, ACP and many others. He has appeared on television news programs as an expert on telecommunications policy and technology and has lectured worldwide in such places as [Beijing China](#), Tel Aviv, Israel, Santiago, Chile. He served as a City Councilman and Mayor, [City of Ovilla Texas](#), from 1987-1997.

## Exhibit 1

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**Diana C. Durham**  
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April 28, 2011

***Via Electronic and Overnight Delivery***  
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Attorney & Counselors  
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Dallas, TX 75219

**Re: AT&T Texas' Final 30 Day Notice of Disconnection to Awesome Paging, Inc.**

Dear Mr. Fein:

On August 24, 2010, AT&T Texas sent a demand letter and notice of intent to disconnect within thirty days to Awesome Paging, Inc. ("Awesome Paging"). A copy of that letter is attached hereto for your reference. AT&T Texas' August 24, 2010 letter demanded that Awesome Paging pay AT&T Texas the \$6,780,692.90 that Awesome Paging owed AT&T Texas as of that date. As of today, Awesome Paging owes AT&T Texas \$7,608,758.45. Subsequently, as Awesome Paging's counsel, you corresponded with my colleague, Mr. Timothy Whitley, and with me. In my letter to you of September 22, 2010, I provided you with notice that, in addition to non-payment, Awesome Paging also is in material breach of the parties' interconnection agreement ("ICA"), because it is not using the interconnection facilities only for one-way paging services, as is required by the ICA, but, instead, is using the interconnection facilities primarily for dial-up internet services.

As you know, on April 21<sup>st</sup>, 2011, the parties discussed their positions via a conference call, and after thirty minutes of discussion, it was clear to both parties that their positions are irreconcilable. Mr. James Young, the CEO of Awesome Paging, participated on the call, as did Mr. Norm Collins, Vice President-Specialized Services for AT&T. In addition, Mr. Leo Wrobel, Awesome Paging's consultant, and you participated on the call, on behalf of Awesome Paging, and, on behalf of AT&T Texas, Mr. Marc Cathey and I participated. The parties each had additional personnel on the call as well. Section 33 of the parties' ICA contains the dispute resolution provisions. Section 33.1 provides:

**"The Parties agree that in the event of a default or violation hereunder, or in the event of any dispute arising under this Agreement (collectively, "the Dispute"), the Parties shall first meet and confer to discuss in good faith the Dispute and seek resolution prior to taking any action before any court or regulatory authority, or before making any public statement about or disclosing the nature of the Dispute to any third party. Such conference shall occur at least at the Vice President level for each Party. In the case of LEC, its Vice President, or an equivalent officer, shall participate in the "meet and confer" meeting."**

The requirements of Section 33.1 are therefore met.

In addition, Section 12 of the parties' ICA contains the Term and Termination provisions. Section 12.1 states:

**“Carrier represents and warrants that (1) it is licensed by the FCC to provide one-way paging CMRS in the state in which interconnection pursuant to this Agreement will be provided, and (2) it will use the interconnection arrangements under this Agreement only to provide one-way paging CMRS to the general public in the area covered by such license. IF CARRIER DOES NOT PROVIDE ONE-WAY CMRS SERVICE TO THE GENERAL PUBLIC IN THE STATE IN WHICH INTERCONNECTION PURSUANT TO THIS AGREEMENT WILL BE PROVIDED, OR SEEKS TO USE THE ARRANGEMENTS SET FORTH IN THIS AGREEMENT FOR ANY OTHER PURPOSE, OR IF CARRIER DOES NOT HAVE, AT ANY POINT DURING THE TERM OF THIS AGREEMENT, AUTHORITY FROM THE FCC TO PROVIDE ONE-WAY PAGING CMRS, THIS AGREEMENT SHALL IMMEDIATELY BE VOIDABLE AT LEC'S OPTION.”**  
(Emphasis in Original).

Awesome Paging is clearly in violation of the requirements of Section 12.1, because it is not using the interconnection arrangements *only to provide one-way paging CMRS to the general public in the area covered by such license*. Accordingly, AT&T Texas hereby invokes its right to immediately void the parties' interconnection agreement, pursuant to Section 12.1.

Further, Section 12.6 of the parties' ICA states:

**“Either Party may provide thirty (30) days written notice of termination of this Agreement to the other for repeated or willful material violation, refusal to comply with the provisions of this Agreement, which material violation or refusal has continued uncured for thirty (30) days following receipt of written notice by the defaulting Party. The terminating Party shall notify the FCC and the Commission and concurrently give the other Party written notice of the prospective date and time of discontinuance of service.”**

Pursuant to Section 12.6, AT&T Texas hereby provides Awesome Paging with a final thirty (30) day notice of termination and disconnection of services and in conformance with the requirements of Section 12.6, AT&T Texas is delivering a copy of this letter to the FCC and to the Texas Public Utility Commission. AT&T Texas will begin the disconnection process on Monday, May 30, 2011.

Very truly yours,



Diana C. Durham

Cc: James Young, CEO, Awesome Paging, Inc.  
Alex Starr, Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC  
Sue Mainzer and Robert Saldana, Texas Public Utility Commission

Attachment

**Exhibit 2**

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NEW YORK BARS

**VICKIE S. BRANDT**  
MEMBER OF TEXAS BAR

OF COUNSEL:  
**CHARLES I. KAPLAN**  
MEMBER OF TEXAS,  
DISTRICT OF COLUMBIA  
& FLORIDA BARS

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May 19, 2011

*Via E-Mail: diana.durham@att.com and First Class Mail*

Diana C. Durham  
AT&T  
637 Kuehnle St.  
Ann Arbor, MI 48103

Re: Awesome Paging, Inc./ AT&T

Dear Ms. Durham:

We are in receipt of your April 28, 2011 letter regarding Awesome Paging.

**Operational Support System Failures and Non-Payment of Monies Owed**  
**Awesome Paging**

Your letter infers the issues and dispute between Awesome Paging and AT&T started August 24, 2010. You are fully aware this matter goes back to 2005 and before. AT&T and Awesome Paging have exchanged letters, had telephone conferences and engaged consultants and legal representation to deal with the disputed contentions of the parties. Frankly, it is inconceivable AT&T would be threatening to shut down a competitor business given the deplorable record of AT&T performance in this case that includes the following:

- From 1997 until 2006, AT&T's OSS (Operational Support System) generated erroneous "Access" invoices to CMRS providers including Awesome. AT&T billed Access (tariff) rates rather than the rates prescribed in Awesome's ICA. AT&T never corrected this problem and kept billing the erroneous Access charges to Awesome as well as many other CMRS providers.<sup>1</sup> There is an expansive record of huge billing credits paid out by AT&T to CMRS providers for these kinds of OSS failures.<sup>2</sup>

<sup>1</sup> This is despite the fact that AT&T's OSS system was a "271" commitment to the FCC and Texas Public Utility Commission. AT&T never fixed these OSS problems. Instead, AT&T wrote successor Interconnection Agreements to emphasize "Access" services -- as these were the only services AT&T could be sure would flow through and bill correctly. Type 1, Type 2A and other services billed to Awesome incorrectly at Access rates have never been corrected.

<sup>2</sup> Including ASAP Paging and other members of TAPS (Texas Association of Paging Services) for whom Ted Gaetjen of ASAP Paging served as President and James Young of Awesome Paging was a member.

- It is, in fact, AT&T who owes Awesome Paging \$3 million dollars in ISP compensation that is supported by an FCC order. (unlike AT&T's claim that is not supported by ICA).<sup>3</sup>
- Awesome Paging repeatedly requested that AT&T justify its billing Access charges through copies of Access Service Requests (ASRs) supporting AT&T's claim. Each time such requests were made, AT&T broke off communications. To date, AT&T has not produced a single ASR to justify its claims for millions in Access revenue from Awesome.<sup>4</sup>
- No mention of the meeting on April 7, 2006 held between Awesome Paging and Memo Garcia, Darlene Russo, Jennifer Curtis, Dena Charba and other AT&T technical personnel in mid-2006 is made in your letter. At *that* time the erroneous amount claimed to be "owed" of \$5,380,707.02 that Awesome Paging disputed in detail was fully discussed and addressed with AT&T.
- Your letter also declines to mention the detailed, line-by-line, analysis of AT&T's erroneous Access charges provided by Awesome to AT&T prior to the above referenced meeting in which it was discussed. (**Attachment "A"**) AT&T never responded to this analysis except for a vague reference four years later by AT&T legal department. In the final paragraph AT&T attorney's Tim Whitley letter he made the statement "*Awsome has previously disputed these amounts and AT&T, after review of the disputed amounts, has denied them.*"<sup>5</sup> On what basis the amount were denied is a total mystery to this day.

In the past four years AT&T has had more than ample time to review Awesome's detailed analysis and provide a reply.

#### **AT&T Wants to Bill "Legacy" ICAs (Awesome) Like "New" ICAs (Fitch)**

Awsome Paging is operating under one of a handful of "Legacy" ICAs from the late 1990s. The Awesome Paging ICA is a very much different from the Fitch ICA, which was negotiated almost a decade later. Indeed, companies like Fitch were precluded by AT&T from adopting a Legacy ICA at all. This was probably because the "new" ICAs have provisions that are much more favorable to AT&T. Many kinds of connections in "new" ICAs must be ordered as Access with ASRs. This is not true with the Awesome's ICA. Despite the age of the Awesome ICA it is still valid and enforceable. In addition, over the years, the FCC has

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<sup>3</sup> The FCC in *In The Matter of High Cost Universal Service Support, et al.* FCC 08-262, retroactively amended all CMRS Interconnection Agreements, including legacy Agreements like Awesome's. AT&T routinely pays ISP compensation to other carriers at the FCC established rate of \$0.0007 but refuses to pay Awesome.

<sup>4</sup> Awesome Paging has one of the original CMRS Paging agreements. Unlike other carriers (including Fitch Affordable Telecom and others, negotiated *much* later) the Awesome Paging ICA contains no provision for ordering "Access" services except out of the tariff. Access orders require ASRs. Despite repeated requests, AT&T has never produced a single ASR to justify its claims against Awesome.

<sup>5</sup> November 1, 2010 letter from Timothy Whitley to Eric Fein, Awesome Paging counsel, pg. 3.

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made rulings that effect Awesome's ICA. FCC rulings affecting this dispute are (1) the use of telecommunications service to carry information services, and, (2) ISP compensation.<sup>6</sup>

#### **Awesome Offers Telecommunication Services**

Awesome Paging offers a "telecommunications service."<sup>7</sup> Use of a portion of its network for information services is therefore allowed. In *Time Warner* for example, the FCC concluded that a carrier may use interconnection in order to provide information services.<sup>8</sup>

A telecommunication carrier that has interconnected or gained access under Sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, *may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well.* (Emphasis Added).

The law is clearly on the side of Awesome Paging in its use of its telecommunication services to provide ISP service. In my October 12, 2010 letter to you I outlined the state of the law concerning this. You will recall I said:

"In *World Com, Inc. v. FCC*, 288 F. 3d 429 (D.C. Cir. 2002) The D.C. Court of Appeals specifically rejected the argument that ISP bound calls were excluded from Section 251(g) of the Communication Act and nullified the FCC rulings to avoid the reciprocal compensation requirements of Section 251(g) for ISP dial up traffic. The D.C. Court of Appeals in *In Re: Core Communications*, 539 F. 3d 849 (D.C. Cir. 2008) issued a mandamus to the FCC requiring it to issue final orders on the applicability of reciprocal compensation requirements to ISP bound traffic. Pursuant to the Court's directive, the FCC concluded that Section 251(b)(5) covers all telecommunications specifically including ISP bound traffic. The interim compensation scheme establishing a cap of .0007 a minute for ISP bound traffic was set in place until further compensation rules are

<sup>6</sup> The FCC in *In The Matter of High Cost Universal Service Support, et al.* FCC 08-262, retroactively amended all CMRS Interconnection Agreements, including legacy Agreements like Awesome's. AT&T routinely pays ISP compensation to other carriers at the FCC established rate of \$0.0007 but refuses to pay Awesome.

<sup>7</sup> 47 U.S.C. § 153(46), defines a telecommunications service as "... the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." "Telecommunications" is defined as "... the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153 (43).

<sup>8</sup> The FCC determined that telecommunications services "are intended to encompass only telecommunications provided on a common carrier basis." *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 217 (3d Cir. 2007, pet. denied) citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd. 8776, 9177-8, ¶ 785 (1997); *Time Warner* at ¶ 14 and fn 39.

adopted. (No other compensation rules have been adopted to this point.)

Moreover, MRSPs are provided a number of rights related to interconnection under Section 20-11 of the FCC rules. The FCC in *Local Competition Order*, 11 FCC Rcd. 15990, classified carriers carrying both telecommunication services and information services as telecommunication carriers for purposes of the Communication Act Section 251(a). Further, the FCC ruled that telecommunications carriers could offer information services through the same arrangement they offer telecommunication services. 11 FCC Rcd. 15990.”

Tim Whitley, AT&T’s attorney, admitted in his November 1, 2010 letter<sup>9</sup> that: “*Your statement of the law seems correct...*” Pursuant to the terms of 47 C.F.R. § 51.100(b), interconnection may be used for non-telecommunications traffic.

#### ***Fitch Does Not Apply***

AT&T has also tried to compare the current situation with *Fitch*<sup>1</sup> and has claimed that the *Fitch* case has precedential authority. *Fitch* is distinguishable and not applicable to Awesome Paging. The following are some of the reasons:

- First, *Fitch* offered information service traffic before it had an ICA in place. Awesome has had an ICA with AT&T since 1998.
- *Fitch* also *later* added a paging terminal, as opposed to Awesome who has operated a CMRS paging service for many years.
- *Fitch* was attempting to *negotiate a new* Interconnection Agreement with Texas (Texas PUC Docket 29415) under 2006 rules not the 1997 rules that are applicable to Awesome.
- The 2006 *Fitch* ICA contained *some* basis for charging Access rates but the Awesome ICA has no such basis other than a voluntarily submitted ASR for *some* services.
- Finally, the Fifth Circuit ruling that AT&T is relying on clearly states on the first page of the opinion that it is not precedent-setting. It was based on unique and narrowly defined circumstances.

As you are well aware, this matter has been ongoing between AT&T and Awesome Paging for years. AT&T has been fully apprised of these issues and chose to sit on its hands for four (4) years without any action.

<sup>9</sup> November 1, 2010 letter from Timothy Whitley to Eric Fein, Awesome Paging counsel, page 2.

<sup>1</sup> *Fitch v. PUC*, 261 Fed. Appx. 788 (5th Cir. Tex. 2008)

### **Contract Provisions Have Been Waived**

Finally, when faced with the inconsistency and weakness of the numerous and contradictory positions it has taken in this dispute, AT&T is now resorting to a strict contract argument that does not hold up.

The ICA refers the parties to the laws of the State of Texas with regard to this matter. The concept of *waiver* is relatively simple and well established under Texas law.

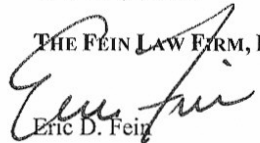
- "Waiver" is an intentional relinquishment of a known right either made expressly, indicated by conduct that is inconsistent with an intent to claim the right, or shown by the circumstances surrounding the making of the contract. *United States Fidelity & G. Co. v. Bimco Iron & M. Corp.*, 464 S.W.2d 353, 357 (Tex. 1971); *In re Slavonic Mut. Fire Ins. Ass'n*, 308 S.W.3d 556, 561 (Tex. App.--Houston [14th Dist.] 2010, no pet. h.); *Johnson v. Structured Asset Services, LLC*, 148 S.W.3d 711, 722 (Tex. App.--Dallas 2004, no pet.) (party's silence or inaction for sufficient time period to show intention to yield contract right is sufficient to prove waiver).
- "Waiver has been frequently defined as an intentional relinquishment of a known right or intentional conduct inconsistent with claiming it. *Texas & P. Ry. Co. v. Wood*, 145 Tex. 534, 199 S.W. 2d 652 (1947); *Rolison v. Puckett*, 145 Tex. 366, 198 S.W. 2d 74 (1946). In *Equitable Life Assur. Society v. Ellis*, 105 Tex. 526, 147 S.W. 1152 (1912). The Texas Courts held that waiver is essentially unilateral in its character. It results as a legal consequence from some act or conduct of the party against whom it operates. No act of the party in whose favor it is made is necessary to complete it and it need not be founded upon a new agreement, be supported by consideration, be based upon an estoppel or reliance. *Massachusetts Bonding And Insurance Co. et al., Petitioners v. Orkin Exterminating Company, Inc.*, 416 S.W.2d 396 (Tex. 1967).
- And a party may waive contract provisions that are for the party's benefit. *Ames v. Great Southern Bank*, 672 S.W.2d 447, 449 (Tex. 1984); *In re Slavonic Mut. Fire Ins. Ass'n*, 308 S.W.3d 556, 561 (Tex. App.--Houston [14th Dist.] 2010, no pet. h.); *Johnson v. Structured Asset Services, LLC*, 148 S.W.3d 711, 722 (Tex. App.--Dallas 2004, no pet.). *Howell v. Homecraft Land Development*, 749 S.W.2d 103, 108-109 (Tex. App.--Dallas 1987, den.).

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The facts and circumstances of this matter clearly show that AT&T was fully aware that Awesome Paging was engaged in ISP dial-up service for many years in a practice clearly allowed under its Legacy ICA and subsequent FCC rules. AT&T has repeatedly sought to charge Awesome for Access Service fees for this service over the course of five (5) years. AT&T is well aware of these issues not only from its long history with Awesome but also from its own regulatory experience and precedents.<sup>10</sup> There is no question that AT&T has waived the provision it seeks to enforce.

It took four years for AT&T to respond to Awesome Paging with a blanket denial that was devoid of written justification or explanation whatsoever. Clearly AT&T has waived any legal claim it has against Awesome Paging by its inaction and lack of justification or explanation. I advise AT&T to abandon its proposed termination and, I stress that if AT&T takes any adverse action against Awesome Paging on May 30, 2011 or at any other time it should be prepared to bear the full consequences of those actions.

Very truly yours,

THE FEIN LAW FIRM, P.C.  
  
Eric D. Fein

EDF/mam  
Enclosures

Cc: Leo A. Wrobel  
TelLAW Com LABS

<sup>10</sup> *Southwestern Bell Decision* at 1481: "[I]t is at least logical to conclude that one can be a common carrier with regard to some activities but not others," quoting *National Ass'n of Regulatory Util Comm'ers v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976).

# Certificate of Service

I hereby certify that I caused true and correct copies of the foregoing to be served as follows, commensurate with the filing of this Petition with the FCC:

**Via electronic mail to:**

Best Copy and Printing Inc.  
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